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In the Supreme Court of the United States

OCTOBER TERM, 1980

ANTONIO JOHN PALUMBO, II, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the district court improperly restricted his cross-examination of a government witness concerning her recent hospitalization and her 1972 suicide attempt.

1. Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of conspiracy to possess and pass counterfeit bills, in violation of 18 U.S.C. 371 (Count 1), conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846 (Count 2), possession of counterfeit bills, in violation of 18 U.S.C. 2 and 472 (Count 3), and transfer and delivery of counterfeit bills, in violation of 18 U.S.C. 2, 472 and 473 (Count 4-6).[1] He was sentenced to consecutive

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[1] A seventh count, relating to possession of cocaine with intent to distribute it, was dismissed during trial, and the jury acquitted petitioner on an eighth count, relating to the distribution of cocaine.

terms of two years' imprisonment on Counts 1 and 2 and one year's imprisonment on Count 3, and to concurrent two-year sentences on Counts 4, 5 and 6 (Pet. App. 2a-3a, 5a).[2] The court of appeals vacated petitioner's conviction on Count 2, the cocaine charge, and affirmed his convictions on all other counts (Pet. App. 1a-22a).

The evidence at trial showed that unindicted co-conspirator Mary Jane Pfaff entered into an agreement with Jon Crosson to receive counterfeit money, which Pfaff was to exchange for genuine currency (Pet. App. 2a-3a; S. Tr. 9-10).[3] On several occasions from August 1978 to October 1978, petitioner gave counterfeit money to Pfaff, who then passed the money and returned genuine currency to petitioner (Pet. App. 3a; S. Tr. 11-13). In all, petitioner gave Pfaff from $60,000 to $70,000 in counterfeit bills, and he received in return from $15,000 to $20,000 in real currency (S. Tr. 19-20).

2. Petitioner contends (Pet. 3-9) that the district court improperly restricted his cross-examination of Pfaff concerning her attempted suicide in 1972 and her recent hospitalization, thereby denying him his Sixth Amendment right of confrontation. The court of appeals correctly rejected this claim (Pet. App. 5a n.3).

Although a defendant may not be deprived of the right to effective cross-examination (*Davis* v. *Alaska*, 415 U.S. 308 (1974)), this right is not unlimited, and a trial court's decision to limit cross-examination will not be reversed absent

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[2]The net result of the sentence was either a five or six year prison term. In light of the ambiguity of the sentence, the court of appeals left the question whether the intended prison term was five or six years for the trial court on remand. Pet. App. 5a & n.2.

[3]"S. Tr." refers to the supplemental transcript, which contains Pfaff's direct testimony. "Tr." references are to her testimony on cross-examination, redirect and recross.

an abuse of discretion. *United States* v. *Bastone*, 526 F. 2d 971, 981-982 (7th Cir. 1975), cert. denied, 425 U.S. 973 (1976). Here, petitioner thoroughly cross-examined Pfaff concerning her use of drugs and her mental state (Tr. 174-179, 191-192, 211-217, 482). His inquiry revealed that Pfaff had used marijuana, hashish, LSD, mescaline, Seconal, Tuinal, Nembutal, cocaine, quaaludes and Methadrine, as well as a number of prescribed drugs; that she had taken illegal drugs as recently as three days before her testimony; and that she was taking prescribed drugs every day in connection with an emotional problem (Tr. 174-177, 191-192, 211, 215). Pfaff specifically admitted that some of the drugs she had taken could affect one's perception and, indeed, that her use of drugs "has affected my memory to a degree as far as minute details go" (Tr. 176). Pfaff testified under defense questioning that she had been under psychiatric care for nine years, that she was currently under psychiatric care, and that she had reported increasing lapses of memory for the preceding eight or nine months (Tr. 177-178). Defense counsel also elicited the names of all the institutions at which Pfaff had been treated and inquired about medical reports concerning her mental state (Tr. 212-215, 248-249). Defense counsel also cross-examined Pfaff specifically concerning the possibility that she suffered from visual hallucinations (Tr. 178-179).

When Pfaff was recalled to the witness stand some days later, defense counsel brought out the fact that during the intervening weekend Pfaff had been admitted to the psychiatric unit of the Armstrong County Hospital (Tr. 482). The court prohibited further cross-examination on that subject absent medical testimony that Pfaff's problems affected her truthfulness. The court found the information defense counsel sought to elicit to be so highly prejudicial and unfair to the witness as to outweigh any probative value, and

observed that Pfaff's emotional problems already had been extensively portrayed to the jury (Tr. 483-484).[4]

In these circumstances, the district court's action was not an abuse of discretion. The court did not prohibit cross-examination concerning a relevant subject. Indeed, defense counsel was given wide latitude in asking questions concerning Pfaff's mental state and her ability to perceive and recall accurately. The district court required only that *further* inquiry into this matter be preceded by a proper foundation.[5] It was not unfair for the court to require medical testimony to establish some correlation between Pfaff's emotional state and her veracity, in order to prevent additional cross-examination from turning into persecution or ridicule of her, instead of a test of her credibility. See *United States* v. *Estell*, 539 F. 2d 697, 699-700 (10th Cir.), cert. denied, 429 U.S. 982 (1976). Petitioner's counsel had access to the witness's doctors and the opportunity to present medical information to the jury. Hence, his failure to demonstrate the relevance of his proposed line of inquiry provided ample reason for the court to restrict further

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[4]The court stated that it believed defense counsel was authorized to talk to Pfaff's physicians, including the physician who had admitted her to the hospital over the weekend, and that if he did not have authorization to talk to the doctors and get Pfaff's medical records, the court would see to it that he got such authorization (Tr. 484).

[5]Even defense counsel recognized the cumulative nature of the evidence he was attempting to introduce. In response to the government's request for an offer of proof (Tr. 482), defense counsel characterized the testimony he wanted to elicit from Pfaff as follows (Tr. 483): "the thrust of it is that Mary Jane Pfaff had a sufficient emotional problem over the weekend that it required her to be hospitalized; that she was let out this morning in time to come to court. I think it goes to her emotional stability in line with what's been brought out on cross-examination and, in fact, in line with what was brought out on direct examination even from this witness."

questioning on the subject, particularly in view of the extensive questioning in that same area that the court already had permitted.[6]

Accordingly, it is immaterial whether the attempted cross-examination is viewed as an attack on Pfaff's general credibility or on her ability to recall and report accurately the specific events of the offenses charged. In either case, defense counsel's prior extensive questioning of Pfaff concerning her use of drugs, her psychiatric history, and her powers of recollection, as well as the district court's willingness to permit him to delve even more deeply into those areas after he had laid a proper foundation for doing so, render the cases relied on by petitioner inapposite.[7]

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[6]The district court also properly restricted inquiry into Pfaff's seven year old suicide attempt on the grounds that the unfair prejudice outweighed any probative value, that it was remote, and that it had no relevance to Pfaff's veracity (Tr. 199).

[7]For example, in *United States* v. *Partin*, 493 F. 2d 750 (5th Cir. 1974), the court reversed the trial court's refusal to admit *hospital records* showing that the government's witness was having auditory hallucinations a few months prior to the events about which he testified. In contrast, in the present case the court's ruling was based on the *absence* of any medical evidence that Pfaff's recent hospitalization was suggestive of any impairment of her credibility. Similarly, although in *Sinclair* v. *Turner*, 447 F. 2d 1158 (1971), cert. denied, 405 U.S. 1048 (1972), the Tenth Circuit observed (447 F. 2d at 1162) that "[t]he fact of insanity or mental abnormality either at the time of observing the facts which [the witness] reports in his testimony, or at the time of testifying, may be provable, on cross-examination or by extrinsic evidence, as bearing on credibility," it held (*ibid.*) that the district court had not abused its discretion by limiting defense counsel's inquiry into the psychiatric history of the prosecution's principal witness where the defendant "[d]uring the offer of proof * * * made no claim that she could or would produce any hospital, medical or prison records, or that she could or would produce any examining physicians to impeach [the witness's] testimony."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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